

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6003

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

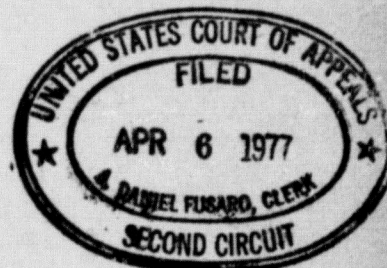
UNITED STATES OF AMERICA and
JENNIFER J. HERZOG, Special Agent,
Internal Revenue Service,
Petitioners-Respondents,
VS.

ASPHALT MATERIALS, INCORPORATED,
CHARLES HALL, President,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

**REPLY BRIEF FOR RESPONDENTS-
APPELLANTS**

ALBRECHT, MAGUIRE, HEFFERN
& GREGG,
Attorneys for Respondents-Appellants,
2110 Main Place Tower,
Buffalo, New York 14202,
Telephone: (716) 853-1521,
CHARLES H. DOUGHERTY, *of Counsel.*



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UNITED STATES OF AMERICA and
DENNIS J. HERZOG, Special Agent,
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Petitioners-Respondents

-vs-

DOCKET NO.
77-6003

ASPHALT MATERIALS, INCORPORATED
CHARLES HALL, President

Respondents-Appellants

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

Response To Government's Argument

Despite the plethora of cases cited by the government in its brief, it fails to cite a single case in which a court has considered the issue of the failure of the government to follow its own rules establishing the kind of detailed information required to support an application to the court to enforce an IRS summons.

The government attempts to brush off this serious defect in its defense by simply saying "regardless of the internal guidelines, the District Court properly concluded that the Government's showing was sufficient" (page 10, government brief). This statement likewise has no citation

to support it. At no point does the government even make a pretense of explaining the paucity of supporting data in the affidavit of agent, Dennis J. Herzog, - detailed information absolutely required by Section 268.3(1) of the "Handbook of Special Agents."

There is an attempt throughout the government brief to accuse the appellant of contending that the IRS has no authority to investigate suspected criminal violations and that the government must show probable cause. This is completely erroneous. While the government relies on United States v. Bisceglia, 420 U.S. 141 (1975) to support its argument, it is important to point out that Chief Justice Burger speaking for the majority of the Court clearly states that while Section 7601 of the Internal Revenue Code gives the IRS a broad mandate to investigate and Section 7602 provides the power to examine books and records, nevertheless, "[T]he purpose of the statutes is not to accuse but to inquire" (page 146).

In the present case the government attorney has left no doubt about the fact that the appellant, Charles Hall, is already an "accused" man (R, page 22).

Justice Blackmun, in a concurring opinion in Bisceliga, supra, made it clear that in upholding a "John Doe" summons in that case, that "[W]e do not decide that a 'John Doe' summons is always enforceable where the name of the

individual is lacking and the Service's purpose is other than investigative" (page 152).

In citing United States v. Powell, 379 U.S. 48 (1964) (government brief), the government neglects to point out that in stating the showing the Service must make, Justice Harlan, speaking for the majority went on to say at page 58 of the opinion:

"This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing he 'may challenge the summons on any appropriate ground', Reisman v. Caplin, 375 U.S. 440 at 449, 11 L.ed. 2d 459 at 466, 84 S.Ct. 508. Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused."

The government further complains that appellant did not raise the issue of prosecutorial intent in its written response or make an oral request for an evidentiary hearing. They seem to forget that it was the government who injected this question into the proceeding by the admissions of the Federal Attorney at the hearing. In any event, the

proceeding to compel compliance with an administrative summons is equitable in character and a taxpayer's rights cannot be so summarily dismissed in a matter of such vital importance Kennedy v. Rubin, 254 F.Supp. 190 (1966). Furthermore, the fact that appellant opposed enforcement of the summons in itself raised issues pertinent to the issuance that the Federal Attorney would be willing to admit the true nature of the inquiry. Such an admission in and of itself should be sufficient to warrant a hearing as to the motivation behind issuance of the summons. Finally, it ill behoves the government to complain on any technical basis since it did not state facts sufficient to make out a *prima facie* case for enforcement. United States v. McCarthy, 514 F.2d 368, 373.

Again, the government will accept no opinion which does not completely endorse its reading of Donaldson v. United States, 400 U.S. 517 (1971). It tortures *Donaldson* to stand for anything and everything that favors enforcement. Any opinion evidencing another view is painted as "totally erroneous" (page 24 of government brief).

While the government makes much of the fact that it claims no prosecution has been recommended it is certain that *Donaldson* also requires that a summons be issued in good faith.

"Thus if it can be shown that the investigating agent had already formed a firm purpose to recommend criminal prosecution even though he had not as yet made a formal recommendation, issuance of the summons would presumably be in bad faith. Similarly, if the civil liability had already been determined the summons would appear to be solely for a criminal purpose." United States v. Wall Corporation, 475 F.2d 893, 895 (1972).

"A preceding Justice Department recommendation to prosecute is not the *sine qua non* for proving that an Internal Revenue Summons was issued for an improper purpose." United States v. Lofko, 520 Fd.2d 622 (1975).

In the present case, the only way to make a determination as to prosecutorial intent is to conduct a hearing. Failure of the District Court to so order is error.

Appellant's "dissatisfaction" (page 11, government brief) stems not from a desire to gain information of the agent's investigation but rather a desire that the government observe its own rules and the fundamental rules of due process before it starts an excursion through appellants' complete business records.

Respectfully submitted,
ALBRECHT, MAGUIRE, HEFFERN & GREGG
Attorneys for Respondents-Appellants
Office and Post Office Address
2110 Main Place Tower
Buffalo, New York 14202
Telephone: (716) 853-1521

Charles H. Dougherty, of Counsel

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

USA and Dennis J. Herzog et al
vs. Asphalt Materials Inc. et
al

77-6003

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
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Leslie R. Johnson

Sworn to before me this

4th day of April, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
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